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DEVELOPMENT OF WATER POWER

COMMENTS

RELATIVE TO H. R. 16053. AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO REGULATE THE CONSTRUCTION OF DAMS ACROSS NAVIGABLE WATERS," APPROVED JUNE 21, 1906, AS AMENDED BY THE ACT APPROVED JUNE 23, 1910

PRESENTED BY MR. JONES

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DEVELOPMENT OF WATER POWER.

UNITED STATES SENATE, *August 12, 1914.*

Mr. M. O. LEIGHTON,
Consulting Engineer, Washington, D. C.

DEAR SIR: I inclose herewith a copy of the so-called Adamson bill relating to the erection of dams across the navigable waters of the United States recently passed by the House of Representatives and now referred to the Senate Committee on Commerce.

I am greatly interested in the general subject of water-power legislation, having introduced into the Senate some time since a bill covering the development of water powers on the public lands. I have been informed that in your former official capacity, and in connection with your present professional practice, you have given considerable study to this matter. I therefore have to ask whether you will be willing to assist me in my consideration of the matter by writing such comments on the Adamson bill as will reflect your opinion of its provisions.

Very truly, yours,

W. L. JONES.

WASHINGTON, D. C., *August 14, 1914.*

Hon. W. L. JONES,
United States Senate, Washington, D. C.

DEAR SENATOR: You have requested a statement of my opinion of H. R. 16053, known as the Adamson bill, "to regulate the construction of dams across navigable waters," recently passed by the House of Representatives and now referred to the Senate Committee on Commerce. Complete response would occupy unreasonably extended space. I will therefore confine my suggestions to the parts that seem to me fundamentally in error.

I will cite in order my practical objections to the bill. Following that, an appendix will be submitted, containing a copy of the bill and a more or less detailed discussion of some of the objections, which may be of use in case you should desire to pursue the subject in detail.

First, let me say that my prejudices all favor the public interest. Therefore, if in any of the following observations it may seem to you that I am favoring the private rather than the public interest, I beg you to be assured that the inference is wholly against my inclinations. But, though favoring the public interest, I am still unable to deny that two plus two make four. The protection of the public interest is a many-sided campaign. Some of our loudest shouters are plainly less interested in actually protecting the public interest than they are in having that interest protected in their own pet fashion. Sometimes it is a good plan to shoulder into a fight and protect the little fellow from the big one; at other times it's a much better plan to give the little fellow a blackthorn and let him do his own punishing. Be that as it may, no man can assert that the only way to Philippi is across his garden patch.

It is easy to perceive from the mere reading of the bill that those who took part in its passage were encompassed by many doubts. It betrays two sincere desires: First, to secure power development; second, to protect the public interest. It has apparently been assumed by the participants that the two objects are antagonistic. This error, together with a too-evident but quite natural ignorance concerning the "brass tacks" of the power business, has produced a queer bill. To borrow an expression from the late John Hay, this bill is "a fortuitous concourse of unrelated prejudices." But you probably desire a constructive statement.

Unless our form of government is all wrong, there must be some common ground on which the public interest may dwell in accord with the private interest. A water-power act must strike this common ground. If it does not, one of two things will occur: First, the public interest will be abused; second, the investor won't invest in water powers. I do not think that either of these results is necessary. The sovereign mandate of this Nation ought to be sufficient to enforce good conduct of a water-power company. It seems hardly necessary to shackle the company or to make it "die aborning." By sovereign mandate we have forbidden murder and have

provided some rather severe penalties for each offense. No one has, however, after the manner of this power bill, proposed that all our good citizens wear handcuffs to prevent their doing murder. This bill utterly fails to protect the public interest because it would prevent water-power development. Of course, there is some risk in predicting what men will do. Considering the high character of the congressional assembly, however, I think it safe to assert that no one who voted for this bill would be so unwise as to invest a dollar of his own money under it.

(1) Section 1 provides that each development, except those to be located on intrastate streams, shall be the subject of a special act of Congress. This is dilatory, unnecessary, and productive of stagnation. Full authority should be given to the Secretary of War and Chief of Engineers to issue permits in much the same way that such authority is conferred on the Secretary of the Interior in the case of power developments on public lands. This will be further discussed in the appendix.

(2) Section 2 (page 3, lines 4 and 5) provides that there shall be suspended over the financial operations of a power company, to be cut loose at any time, the menace of an expenditure for locks that, in many cases, may equal or exceed the first cost of power installation. In other words, under this provision, a company can not know at the outset within 100 per cent of what its investment is going to be. This is neither fair nor decent. Among the men who supported this bill I do not believe there is one who, were he a landlord, would force upon a tenant a stipulation so deliberately unfair as this one. Investment is investment, security is security, and credit is credit, whether applied to a water-power plant or to a grocery store. If there is one thing that the Government should, in all fairness, concede, it is that any permittee shall, at the outset and before he is overboard, be able to determine his obligations, and thereby be able to decide whether or not he has a reasonable prospect of securing a fair return on the capital he invests. In these days of protest against financial speculation, it ill becomes the Government to legislate in a way that makes speculation a necessity. This will be further discussed in the appendix.

(3) Section 2 (page 3, lines 15 to 21) provides for payment to the Government for the privilege or benefits granted. This is a purely academic matter and much less important than some good men would have us believe. So far as I have observed, public-utility companies operating under public regulation are indifferent as to a rental charge because, be it large or small, it must be paid by the consumer. Some men urge the rental charge as a measure of regulation, but it ought to be apparent on reflection that a charge that can be adjusted only at long intervals as provided in this bill can have only a most remote regulatory function. The sovereign power of government, Federal and State, through public service, railroad, interstate commerce, and interstate trade commissions is a thousandfold more effective agent of regulation. If, however, it be decided that the public interest requires a Federal rental, the section containing the requirement should be unmistakably constitutional, which the present section certainly is not. This point will be discussed in the appendix.

(4) Section 4, paragraph (*c*) (lines 15 to 18), can readily be improved so that procedure thereunder can be facilitated and made

more logical. The language assumes that the President shall inaugurate a system of withdrawals for the sole purpose of promoting navigation. This would involve an extensive and minute study of navigation details on streams that would, in the normal progress of navigation, not come up for consideration for many years. There is no need for any such systematic withdrawal. All the public lands along navigable streams of the West which furnish even remotely practicable power sites have been withdrawn by the President as "water-power reserves." Therefore the public interest therein is well protected. If now it should occur that any of these public lands are included in a prospective navigation-power development under this bill, the easiest way would be to have the President revoke his power withdrawal and substitute concurrently a withdrawal for navigation purposes. To provide for this, all of paragraph (*c*) between the word "lands," in line 15, and the word "as," in line 18, should be stricken out and the following should be substituted:

which, on certification by the Secretary of War that the same are necessary for the purpose of promoting navigation, shall be withdrawn from entry or disposition by the President for navigation purposes.

(5) Section 4, paragaph (*d*). This paragraph, which is a part of the present general dam act, has been a most effective means of preventing water power development on navigable streams. Stripped of all pomposity, the paragraph makes the Government say, "If you spend your money on a water power improvement in one of my streams, I'll not only blow it out of the river at any time I may conceive the notion, but I'll make you pay for the explosive and the labor necessary to wreck your investment." Whether or not the paragraph is intended to mean this, it is impossible to get away from the fact that this is just what the paragraph says. This will be further discussed in the appendix.

(6) Section 7 (page 8, lines 13 to 17) presents another instance in which the destruction of property is established as a necessary and orderly procedure. In this case the investor is denied even the salvage which might be derived from forced sale of the works under decree of court. This is a penal section. The language here objected to is a part of the penalty that may be inflicted for misbehavior of an officer of a company. The stockholder may be entirely innocent. The guilty person, who should be fined or imprisoned, goes free under this section, and the stockholder, living perhaps on the other side of the continent, may have his investment entirely destroyed. Can it be imagined that investors are going to look with favor upon water-power securities subject to this hazard? Why can we not "make the punishment fit the crime"?

(7) Sections 9 and 10. A most important and probably unintentional omission occurs here. The situation created will be no better than that under the present general dam act, under which there has been no water power progress. . A definite 50-year tenure is provided, but after that the property may be left hanging in the air. True, section 10 provides that the United States, or a nominee, may confiscate the property by paying a part of its value, but nothing whatsoever is provided to cover the case in which the United States does not elect to do this. Some provision should be framed that would hold the status of the property without depreciation

while Congress, impeded by its burden of other work, makes up its mind what to do. Supposing that in any particular case Congress should fail to enact the legislation merely for lack of time, as it does at present in many hundreds of cases. The permit would have expired; the permittee would have no rights in the property; everything would be suspended, and the securities would drop to the bottom. In the last 10 or 15 years of the term of such a permit it would be impossible to raise money for betterments and extensions which are constantly demanded by the public. Some provision should be made for extending the permit, if at the expiration thereof the Government does not choose to exercise its option of purchase. The section originally reported by the committee on Interstate and Foreign Commerce covers this point simply and surely, and I can not help thinking, after close analysis, that the objections made to it in House debate are poorly considered.

(8) Section 10 (page 10, lines 7 to 10). This language is evidently intended to prevent the United States from being compelled to take over a lighting system, a street car system, a manufacturing plant, etc., owned by the permittee and constituting an integral part of the property. The fear that prompts such a precaution is shared only by those who have never had practical experience in the power business. If those who share this fear appreciated the real dangers, they would endeavor to place in this bill a strict requirement that there be included in the transfer the very things that they are now trying to exclude. This will be discussed in the appendix.

(9) Section 10 (page 10, lines 12 to 14) legalizes confiscation. It deprives the owner of values to which the Supreme Court has, on at least two occasions, declared that he is entitled. By right of might the United States proposes to force, as a condition of its consent, a sacrifice of values that it could not sustain in an equity proceeding. Such action, save in the intent, can with difficulty be distinguished from that of the road agent. But, governmental ethics aside, can any considerate person believe, on reflection, that any enterprise condemned to forced and permanent depreciation by governmental mandate before a stone is laid is going to prove attractive to an intelligent investor? Legislate as we may, we can not force an individual to invest his money. If we deny reasonable appreciation, which under established jurisprudence is universally accorded to real property, it is really absurd to expect that capital is going to turn from the thousands of investment opportunities that are not subject to confiscation and purchase those that are doomed at the outset to partial sacrifice. The fact that the Government may prescribe confiscation as a condition of consent can not gloss over the fact that confiscation is dishonorable as between contracting parties. The dictum of the Supreme Court in the case of Knoxville *v.* Water Co. (212 U. S., 1) is instructive on this point:

> The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The legislatures and subordinate bodies to whom the legislative powers have been delegated ought to do their part. Our social system rests largely on the sanctity of private property, and that State or community which seeks to invade it will soon discover the error in the disaster which follows.

(10) Section 10 (page 11, lines 9 to 12). The permittee is forbidden to recover moneys actually invested to create "going concern" and is deprived of every other "intangible element." These two expressions should be stricken from the bill. It seems as though the proponent of this amendment and those who supported it did not take time to analyze the meaning of "going concern" and "intangible element." Careful reading should be given to the opinion of the Supreme Court in the case of Omaha *v.* Omaha Water Co. (218 U. S., 180). "Going concern" and "intangible elements" consist of legitimate and necessary overhead charges, interest during construction, necessary engineering and legal expenses, preliminary and development expenses, working capital, cost of marketing securities, cost of developing business, etc. The more definite term is "development expenses." All of these items constitute, in the opinion of the Supreme Court, the legitimate difference in value between a dead, unproductive plant and a live, productive one. Such items have been pronounced legitimate actual expenditures, all contributing to value, and have been approved in more than a score of high court and commission decisions. When the term "going concern" is accurately defined, it will be found that it is made up of expenditures fully as productive as any of those made for actual structures. Nevertheless they are all "intangible elements." This will be further discussed in the appendix.

(11) Section 11 (page 12, line 12). The unfair and erroneous elimination of "going concern" and "intangible" values, previously discussed, is repeated here. The bill is certainly correct in excluding value of franchise and rights granted, prospective profits and good-will, but there can be no virtue nor benefit in a declaration that the results of a necessary and legitimate expenditure shall be confiscated.

(12) Section 12 allows one year for commencement of work, which period may be extended two years by the Secretary of War. It sometimes requires five years or more to finance large developments. It required nine years to finance the Keokuk development. Is it necessary or just to revoke permit when the permittee has honestly done his best to finance and has reasonable prospects of being successful at a later date? The Secretary of War is allowed no discretion beyond three years. It surely should be required that permittees exercise diligence and commence construction as soon as possible—one week may suffice in some cases—but the determination of reasonable diligence should be left to the Secretary of War. The limitation of that officer to an extension of two years (page 14, line 13) should be stricken out.

(13) Section 12 also allows a term of three years to complete the dam, and the Secretary of War may increase this to five years. Very few large dams in navigable streams can be completed within three years. It may be well enough to prescribe that preliminary limitation, but the expression "not to exceed two years" (page 14, line 13) should be stricken out. It required eight years of earnest effort to construct the Hales Bar Dam, on Tennessee River. This bill necessarily confers many discretionary powers on the Secretary of War and Chief of Engineers, the proper exercise of which requires far more executive wisdom than that necessary to determine proper diligence on the part of a permittee.

(14) Section 13. It is well settled that the interests of navigation are paramount and that Congress must reserve the right to amend, alter, or repeal a permit at any time. Nevertheless, we can not avoid the obvious fact that a prudent investor will wisely hesitate and properly refuse to put his money into a development that is subject to destruction without indemnity. True, it has been done in the past, but the investment world has come to recognize the hazards of such a repealing clause. Argue as we may, it must be axiomatic that any investment subject to destruction by repeal without indemnity is a speculative investment. Let the Government be consistent in this matter of speculation. It has been condemned, officially and unofficially, world without end. If the Government is sincere in its desire to create and enforce stability in finance it surely ought not to enact a law which specifically creates a speculative relation. The reform which the Government desires to bring about may purposefully be started in the Government's own business affairs, and what could be more appropriate than to provide that all Government concessions shall be bereft of all speculative elements. A permittee who in good faith erects a power plant under permit from the Government, and maintains and operates that plant in obedience to all laws and regulations, should, if the Government alters or repeals his permit in its own interest, be entitled to indemnity.

Now, this doctrine may not please those who have become crystallized in the gospel of absolute sovereignty with respect to navigable streams, but it seems wise for Congress to determine right now whether it is well to qualify that sovereignty to a minute degree, and thereby encourage and standardize water-power investment, or whether it will cleave to a preconceived and absolute principle which will always inhibit water-power development and confine its securities to the speculative class. Probably there is no Member of Congress who would accept a lease of a piece of land and agree to erect a costly building thereon if it were provided in the lease that the owner of the land, however just and God-fearing, could drive him off without indemnity at any time he chose. Why, then, should anyone expect that similarly wise and prudent men are going to accept precisely the same conditions with respect to water-power plants? Theorize and expound as we may, we will never reduce this water-power proposition to a satisfactory basis until we all agree that the water-power business is a legitimate avocation and subject to the same laws of business, of credit, and of security as any other business. The Government should extend to lessees or permittees at least as equitable a business proposition as that which would pass muster in a group of righteous business men. This does not mean that the public interest should not be protected nor that the Government or the people should not control in all things. It means nothing more nor less than insistence upon the obvious proposition that an invested dollar shall be redeemable at par.

(15) Section 14 (page 16, lines 1 and 2) requires preference in favor of municipal grants. One may advocate municipal ownership of public utilities to the uttermost limit and still wisely oppose this proviso. The municipal use of water power is frequently not the highest and most productive use, though it is granted that under many conditions municipal ownership of water powers may, in a rarely efficient form of municipal government, serve a high

public purpose. But, granting every argument in favor of such ownership, the Secretary of War should not be required to give preference to a municipal corporation when, in his judgment and in that of the Chief of Engineers, such a proceeding would be detrimental to the common good. The wording of the equivalent section in the original bill was admirable and it is difficult to see how there can be any logical objection thereto, viz:

> Preference shall be given to the applicant whose plans are deemed by any action of Congress, or by the Secretary of War and Chief of Engineers, to be best adapted to conserve and utilize in the public interest the navigation and water-power resources of the region.

(16) Section 17 places all power plants constructed on previous guaranty of the Government under the terms of this bill, irrespective of whether the securities will be depreciated as a result of less favorable terms or whether the owners have conducted the plants with due regard for the public interest. It is certain that the original grants were taken by the investors at their supposed face value. It is equally certain that the majority of the investors regarded a Government assurance as equivalent to a Government bond. They had every reason to believe that so long as they conducted their affairs honorably the Government would keep faith. This section violates that faith. Bad conduct merits punishment, but in the absence thereof how can the Government expect that the private affairs of commerce and finance shall be clean unless the Government itself sets the example?

The points above raised relate in small part to expediency in administration, but very largely to the integrity of invested capital and to common honesty between contracting parties. With every part of the bill designed to truly conserve and protect the public interest, I am in accord and would make some portions even stronger than they now are.

It is entirely true that the public interest in water powers surpasses that in any other natural resource, but the fact does not justify the assumption that those who engage in that business must do so at the peril of their investments. The sovereign power of this Government has proved and is proving amply sufficient for the control of social and business conduct. Nothing but stagnation or disaster can result from a legislative measure which, like the bill here discussed, seeks to reinforce supreme sovereignty by depreciating the value of an invested dollar and by loosening the foundations of the financial structure.

With great respect,

M. O. LEIGHTON.

APPENDIX.

[The subhead numbers coincide with paragraph numbers in the letter to which this is subjoined.]

(1)

Concerning the issuance of permits by the Secretary of War instead of by Congress:

Any bill providing for the construction of dams across navigable waters must, if it be at all workable, confer large discretionary powers on the Secretary of War and the Chief of Engineers. The Adamson bill, passed by the House, contains 24 such discretionary provisions, in the proper carrying out of which the Secretary of War and the Chief of Engineers must exercise the highest type of executive wisdom, technical, legal, commercial, and administrative. No well-informed person will deny that the giving of such discretionary powers is an intensely practical necessity. The bill also contains a dozen or more permanent principles and mandates which require no further legislative action. To the subsequent discretion or legislation by Congress are reserved three things: (*a*) The taking over at the expiration of the permit period; (*b*) alteration, amendment, or repeal of the act; (*c*) the granting of consent in each individual development.

The first is necessary, because appropriation of public money is required; the second is the sole privilege of the sovereign body; while the third relates to a matter concerning which Congress, as a body, can have no first-hand information. Having decided, through enactment of the general bill, that water-power development is desirable, and having established the terms and principles under which that development shall take place, Congress would, in practice, largely base its opinion as to the propriety of each project on the reports of the Secretary of War and the Chief of Engineers.

Determination of the propriety of consent is a very small and insignificant job compared with the enormous discretionary responsibilities conferred by necessity upon departmental officers. Officials who could do justice in the latter would find it absurdly easy to decide wisely in the former. The confidence of Congress conferred with respect to great things can, with safety, be extended to cover a relatively small thing. Remember that the terms of each grant are predetermined by and in the "general dam act."

No one has seriously proposed that power grants on the public domain shall be given by special act of Congress. Confidence has appropriately and justifiably been placed in the Secretary of the Interior. The discretion given to that officer is much broader than that here proposed in the case of navigable streams, for the present public-land act and a bill now before the House provide that such grants shall be given "under general regulations to be fixed by him" (the Secretary of the Interior). Now, the protection of the public interest on the public lands is fully as important and difficult as the same public duty on the navigable streams. Why, then, the difference in these two cases? Is there any fundamental reason why less confidence should be imposed in the Secretary of War than in the Secretary of the Interior?

Finally consider a very practical aspect of the case. One element of Government which has impressed the American people of late is

the fact that Congress is overburdened with petty duties. One must acknowledge with profound gratitude the patriotic willingness of the Members to work continuously, if necessary, in the public interest. Nevertheless the fact should be recognized that the larger duties of Congress are worthy of exclusive attention. This being the case, prompt legislation on matters of local interest is physically impossible. The enactment of a law authorizing the erection of a dam across navigable waters can rarely be accomplished in one session. Usually it requires two years and not infrequently has it failed in three years. When the need for power development is so manifest as to warrant the granting of governmental authority, delay and postponement of that authority are of disadvantage both to the prospective consumer and to the producer. Financial arrangements nearly always suffer from delay. Long-continued postponements are destructive of commendable enterprise and of favorable terms in investment. No one can condone unnecessary delay on any grounds. Granting of consent by the Secretary of War would involve delay of months where consent of Congress now involves delay of years. Inasmuch as no public interest can suffer by the change here proposed, it appears as though nothing would be lost and very much of benefit would be gained by conferring suitable authority on the Secretary of War.

(2)

Concerning the requirement that locks must be installed by the permittee "at any time":

House debate on this point was largely directed toward the contention that the Secretary of War and the Chief of Engineers could not decide, a long time in advance, upon the type and capacity of locks that would best meet the needs of commerce in a future day. We may grant, merely for the sake of argument, that the point was well taken. Still it will be necessary to take into account in connection with the consideration of all such fine points the financial possibilities and impossibilities from the standpoint of the permittee and the investor. These features have been suggested in the letter to which this appendix is subjoined. Let us apply the question to a practical case.

A power developer having secured all necessary rights and authority applies to the Secretary of War for a permit thereunder. Under the Adamson bill as it now stands the Secretary of War would be obliged to say in effect: "At some time in the future, I can not tell when, but maybe in 1 year and maybe in 20, you must erect locks in your dam. These locks would, under present prices of labor and material, cost you about $1,000,000." The prospective permittee then seeks to finance, and informs bankers that he desires to sell a bunch of securities to cover cost of construction. "How much money?" say the bankers. "I don't know," says the prospective permittee. "The power plant will cost $1,000,000 or (as the case may be) $2,000,000, but at some time, perhaps 5 years from now and perhaps 20, I must expend $1,000,000 for locks." Two courses are open:

First, in the financing a provision may be made for that $1,000,000 lock expenditure, available on call. The plant will then be considered as a $2,000,000 or $3,000,000 affair and the prospective

returns will be sized up on that basis. It may be necessary to pay some interest, out of earnings, on the reserved $1,000,000 during all that uncertain period. Public-service commissions would establish a consumers' rate based on a "fair value of the plant," but that fair value would not include the $1,000,000 held in reserve to await the decision of the Government as to locks. All of this would be necessary if this industrial investment were to be kept out of the speculative class.

The second procedure would be to borrow the amount of money necessary to erect the works and then to proceed to business, trusting that good fortune will prevent the Government from ever calling for lock construction. Thus the investment would be purely speculative. The securities would always be depreciated by the menace of that enormous and unproductive expenditure for locks. Unproductive is the correct word because, having had the consumers' rates regulated for years by public authority, can it be imagined that the public or the public-service commission would consent to have those rates increased, say, one-third or possibly one-half by reason of the fact that the power company had expended $1,000,000 for locks at the behest of the Federal Government? Without disrespect to the public, it may be said with assurance that such a willingness would never occur.

If at the time of considering the terms of the permit the prospective permittee is required to construct locks or is relieved of that burden, he will be able to determine the required investment and will be able to take his permit or to leave it, according as the prospective investment appears good or bad. That is the only condition under which sound financing can take place.

It has been held that the Corps of Engineers can not determine with absolute certainty just what type or capacity of locks will be required at a future day. True, but this same uncertainty applies with force to the very constructions that the Government itself is now undertaking on various navigable waterways. Progress is inevitable, and this country would be most unfortunate if the principle which was applied in debate on this point were applied to the construction improvements of the Government as a whole. The Corps of Engineers has the latest and best information on the subject. It is able to look ahead over a reasonable interval, and if it should occur that progress in commerce were such as to render obsolete the locks already installed, then the cost of reconstruction will constitute a very small price that we or our descendants should be willing to pay for the benefits of that progress.

Is it wise, for the sake of preparing for a shadowy contingency, to place the investments in water-power plants on navigable streams in the permanently speculative class? Will not the benefits resulting from stability of investment far outweigh any expenditure that may be required of Government in order to correct a possible error in lock construction details?

(3)

Concerning payment to the Government for the benefits derived: If the imposition of a Federal tax or rental is decided upon in spite of the legal objections that have been raised with respect to Federal versus State rights, it will be purposeful to have the act so phrased that it does not do violence to the Federal Constitution. By way of incidental comment, it may be noted that in House debates, as well as in sundry committee hearings and reports, numerous references have been made to the well-established legal principle that the authority to grant carries with it the authority to attach stipulations to the grant. We look in vain, however, for any recognition in proponents' arguments of the highly important qualification of the aforesaid legal principle, viz, that the authority to attach stipulations to the grant may not be sustained if such stipulations violate the rights of a third party possessing sovereign powers. Therefore, it will be wise to examine into Federal taxing authority more thoroughly than has been done in the majority of arguments so far advanced in debate on this subject. The writer personally believes, however, that from the practical standpoint of water-power development and maintenance, the matter of tax or rental is too insignificant to jeopardize the passage of legislation on the subject.

The really important point is to determine whether, in the raising of revenue, Congress has authority to delegate to an administrative officer the powers included in lines 15 to 21, page 3, of the Adamson bill. Counsel whose opinions are entitled to respect have referred with much force to the case of Field *v.* Clark (143 U. S., 700), in which the court's decision as to the authority of Congress to delegate power to the President in a revenue matter is decidedly significant. The decision in brief was that Congress had properly delegated to the President authority to suspend certain tariff for revenue because in the act Congress had clearly specified that suspension was "absolutely required when the President had ascertained the existence of a particular fact." Further, the President was "the mere agent of the lawmaking department to ascertain and declare the event upon which the express law of Congress was to take effect." The act was further saved from being declared unconstitutional because "nothing involving the expediency or the just operation of such legislation was left to the determination of the President." The section of the Adamson bill here discussed sets forth no particular fact, upon the ascertainment of which the Secretary of War may raise revenue. It is clearly provided that said Secretary may use his own discretion as to when the facts justify such taxation. It further unmistakably places in the sole discretion of an executive office the determination of "the expediency of the just operation of such legislation." Moreover, the further discretion is given to change the tax after certain periods have elapsed, and that change surely involves determination of the "expediency and just operation of the legislation."

It is contended that in the case of the United States *v.* Grimaud (220 U. S., 506) the Supreme Court has sustained the authority of Congress to delegate to an administrative officer such powers as are contemplated in the language here discussed; but a careful reading of the decision will show that what the court actually did declare was

that the Secretary of Agriculture had authority to prevent wrongful acts on fores reserves, which wrongful acts were clearly specified by Congress, and to impose penalties, the amount and nature of which were clearly set forth in the law.

Granting, for argument's sake, that the United States has the right to raise revenue as a condition contingent upon the giving of its consent to the erection of dams across navigable waters, it seems clear that the act establishing the tax should also specify the amount thereof.

(5)

Section 4, paragraph (*d*), provides that whenever a dam and power plant erected in good faith under permit of Government and in accordance with plans and specifications officially approved appears to the Secretary of War and the Chief of Engineers as injurious to navigation the permittee must pay the cost of restoring navigability, which restoration might, in any case, be conceived to mean the removal of the works.

The War Department has on several occasions unofficially declared that this paragraph was inserted in the present general dam act at the department's suggestion, and that it was not intended to bring about the destruction of property. The erection of a dam and locks on any stream navigable in fact usually involves changes of location in channels, in lights, and signals, and other adjustments designed to protect and promote navigation. The paragraph here discussed was therefore framed to cover these minor changes, the cost of which would be comparatively small. The intention of the department, however benign, can not efface the menace of a legislative expression which clearly makes property subject to destruction at the discretion of an administrative officer, and without indemnity. Investors can not know nor can they be assured by the inside facts concerning the intent of the law. They are obliged to accept it as expressed, and this is why the paragraph is a wanton preventative of water-power development.

There is no need for this paragraph, either in its present language or in a modified form. Section 2 of the bill provides that the Secretary of War and Chief of Engineers may impose such conditions and stipulations as they may deem necessary to protect the present and future interests of the United States. Every purpose of section 4, paragraph (*d*), could readily be accomplished by inserting in each permit the stipulation that the permittee shall do, or pay for the doing of, all things necessary to preserve the conditions of navagability existing at the time of approval of the permit.

(8)

Concerning the provision in section 10 that in the taking over of any property at the expiration of a permit period the United States shall purchase only the lands or interests therein and the plant and transmission system to initial points of distribution and no other property whatsoever.

Of course, it will not be contended by anyone that the Government should purchase property under separate ownership and to which the permittee supplies power under contract. The assump-

tion of such contracts for power is suitably provided for in section 10 of the bill. This brings the consideration down to property actually owned by the permittee. It is often the case that the main purpose of a permittee in erecting a power plant is to supply power for lighting, street car, and other public utilities which the permittee also owns. The distribution system and the traction system and the power plant are under such circumstances merely elements of a unit investment and they can rarely be separated without large loss. Each part is dependent on the other and each would be practically useless without the other. The elimination of the power plant from the remainder of the system under process of recapture as provided in this section would leave the other end of the system practically without value. It would be a mere dead shell with the living organism removed. Therefore, even under the guarantee of repayment provided in this bill, it would be impossible to secure at favorable rates the money necessary to extend and better the distribution system in compliance with public demand. But there is even a more important phase of the difficulty.

The one thing that make a water-power plant desirable is the market. That market may be a lighting system, a railway system, or even, in some cases, a manufacturing plant. Without that market the power plant would, temporarily at least, be without value. The Government on taking over the plant would be obliged to work up a new market or seize the old one by destructive competition, and then expend money (probably more than the old system would cost) for a new distribution system to supply that market. This would mean a duplication of distribution systems and the public would either have to pay for the maintenance of both systems or the private system would become bankrupt. Yet in this bill we have an apparently serious proposal that when the people take over these power plants they shall be deprived of the essential things that render these plants worth the taking over. The proposition is wholly destructive, for it leaves the market without a source of power and the source of power without a market. Now, if such an absolutely short-sighted policy appears necessary to our legislators, there should at least be inserted in the bill a proviso that will save the Government the expense of building its own distribution system, and also save the people the expense of maintaining two distribution systems and of acquiring their own market. The writer therefore suggests the following language or its equivalent:

> That the property so taken over shall consist of all the property dependent in whole or in part for its usefulness upon the rights hereby granted, which shall include all necessary and appurtenant property, created or acquired, and valuable or serviceable in the distribution of water or in the generation, transmission, or distribution of power, and all other property the value and usefulness of which would be destroyed or seriously impaired by such termination: *Provided*, That in such taking over the United States or said authorized person may elect to exclude from transfer such dependent appurtenant or ancillary property of the grantee as has been or as may be assembled to constitute a separate productive industry, on condition that the transferee shall enter into contract with the grantee to furnish a sufficient amount of power to successfully operate said dependent appurtenant or ancillary property for such period, not exceeding fifty years, as said grantee shall elect and at a price which shall be agreed upon by the two parties as fair and reasonable, and in case of failure to so agree, then at a price determined under proper proceedings in the district court of

the United States for the district in which any portion of said property may be located: *And provided further*, That after such contract has been entered into said transferee shall be estopped from entering into destructive competition with the grantee in the sale or use of power or in the operation of public utilities, within the area occupied by the grantee, so long as the grantee shall render adequate and efficient service at fair and reasonable rates.

(9)

Concerning section 10, page 10, lines 12 to 14, which deprives the permittee of the enhancement in value of land:

In another part of this section it is clearly provided that structures and equipment shall be taken over at the "fair value," which means cost of reproduction new less depreciation. The Government says, in other words, "I'll grant you no appreciation of land to which you are lawfully entitled, but, on the other hand, I'll penalize you for all depreciation." It is a well-settled doctrine that if a utility is to be penalized for physical depreciation of structures it is equitable to balance that penalty, on the other hand, by allowing reasonable appreciation of land.

The United States Supreme Court, in the case of Willcox *v.* Consolidated Gas Co. (212 U. S., 19), upheld the lower court in its approval of the appreciation allowance in the following language:

> And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property which legally enters into the consideration of the question of the rates has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say that there may not be possibly an exception to it where the property may have increased so enormously in value as to render the rate permitting a reasonable return upon such increased value unjust to the public.

The Supreme Court in the so-called Minnesota Rate cases said:

> It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community should not underwrite. As the company may not be protected in its actual investment if the fair value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership, and *it is that property and not the original cost of it of which the owner may not be deprived without due process of law.*

Does the Government wish to prescribe as a condition of consent to legitimate development a stipulation which in an equity proceeding it could not sustain? Some of those who have supported the proposal to take over land at original cost have attempted to justify their views by the contention that in many cases land might enormously increase in value and the public should not be called upon to pay this "unearned increment." These gentlemen should examine the decisions of the court above cited. Especially in the Consolidated Gas decision is it made very clear that the court would not consider full allowance of appreciation "where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public." This decision was based upon a rate-fixing case, but there is no measureable difference in the determination of value for purchase and value for rate fixing.

Consider now the practical effect of this "cost-of-land" measure. All water powers developed on navigable streams would be placed

in the penalized class because they can not, on surrender, be appraised at "fair value." They must from the outset be considered as depreciated property and their underlying securities must always have depreciated value. They must stand alongside of and in competition with properties held in fee, which properties can always claim full "fair value." Therefore Government control in these cases must always be a blight. A property held in fee will be a complete property, every part of which will return its fair value. The property developed under permit will be a crippled property which, by might of Government stipulations, is prevented from returning its fair value. Should not the desire be rather to make such terms and conditions that a property under Government permit could hold up its head and contain within itself every element of success and value that is held by the property in private ownership? Surely the prospect of Government control is not comforting if at the outset it involves legalized confiscation. The highest court in the land has declared without qualification that reasonable appreciation in property values becomes a part of assets, and there can be no possible difference between confiscation of assets represented by appreciation and confiscation of assets represented by treasury funds, machinery, dams, or any other physical structures.

(10)

Concerning the exclusion of "going concern" and "intangible elements" in the appraisal of value:

The Supreme Court, in the case of Omaha *v.* Omaha Water Co. (218 U. S., 180), says:

> The appraisers in making their estimate of valuation included $562,712.45 for the "going value." This separation of an element contributing to the value of each tangible part was done because required to be done under an order made in the circuit court in a suit in which the water board of the city of Omaha was complainant and the members of the board of appraisers and the water company were defendants. The object of that suit was to instruct the appraisers in respect to the mode and manner in which they should proceed. An order resulted which required the board to report the separate elements making up the aggregate value of the plant.
>
> The option to purchase excluded any value on account of unexpired franchise; but it did not limit the value to the bare bones of the plant, its physical properties such as its lands, its machinery, its water pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value in equity and justice must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value and is independent of any franchise to go on or any mere good will as between such a plant and its customers. That kind of good will, as suggested in Willcox *v.* Consolidated Gas Co. (212 U. S., 19), is of little or no commercial value when the business is, as here, a natural monopoly, with which the customer must deal, whether he will or no. That there is a difference between even the cost of duplication less depreciation of the elements making up the water company plant, and the commercial value of the business as a going concern is evident. Such an allowance was upheld in National Waterworks *v.* Kansas City) 62 Fed. Rep., 853).

It would appear from the foregoing decision and from others in Federal and State courts that value for "going concern" consists of legitimate and necessary expenditures.

With reference to "intangible elements": The inclusion of going concern among intangibles is clearly authorized in an earlier decision of the Supreme Court (Knoxville *v.* Water Co., 212 U. S., 1), in which the following language appears on page 9:

> The first fact essential to the conclusion of the court below is the valuation of the property devoted to the public uses, upon which the company is entitled to earn a return. That valuation ($608,000) must now be considered. *It was made up by adding to the appraisement, in minute detail of all the tangible property, the sum of $10,000 for "organization, promotion, etc.," and $60,000 for "going concern."* The latter sum weunderstand to be an expression of the added value of the plant as a whole over the sum of the values of its component parts, which is attached to it because it is in active and successful operation and earning a return. We express no opinion as to the propriety of including these two items in the valuation of the plant, for the purpose for which it is valued in this case, but leave that question to be considered when it necessarily arises. We assume, without deciding, that these items were properly added in this case. *The value of the tangible property found by the master is, of course, $608,000 lessened by $70,000, the value attributed to the intangible property, making $538,000.*

63D CONGRESS,
2D SESSION.

H. R. 16053.

IN THE SENATE OF THE UNITED STATES.

AUGUST 5, 1914.

Read twice and referred to the Committee on Commerce.

AN ACT

To amend an Act entitled "An Act to regulate the construction of dams across navigable waters," approved June twenty-first, nineteen hundred and six, as amended by the Act approved June twenty-third, nineteen hundred and ten.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to regulate the construction of dams across navigable waters," approved June twenty-third, nineteen hundred and ten, be, and the same is hereby, amended to read as follows:

"SECTION 1. That when consent or authority has been or may hereafter be granted by Congress, either directly or indirectly through any duly authorized official or officials of

the United States, to any persons to construct and maintain a dam for water power or other purpose across or in any of the navigable waters of the United States, such dam shall not be built or commenced until the plans and specifications for such dam and all accessory works, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and the Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such dam and accessory works; and after such approval it shall not be lawful to deviate from such plans or specifications either before or after completion of the structure unless the modification of such plans or specifications has previously been submitted to and received the approval of the Secretary of War and the Chief of Engineers. Such plans, specifications, and drawings shall be submitted within two years after the date of the approval of the Act authorizing the construction.

"SEC. 2. That as a part of such approval such conditions and stipulations may be imposed as the Secretary of War and the Chief of Engineers may deem necessary to protect the present and future interests of the United States, which may include the condition that the persons constructing or maintaining such dam shall construct, maintain, and

operate in connection therewith, without expense to the United States, a lock or locks, booms, sluices, or any other structure or structures which the Secretary of War and the Chief of Engineers or Congress at any time may deem necessary in the interests of navigation, in accordance with such plans as they may approve; and also that whenever Congress shall deem such facilities necessary, the persons owning such dam shall convey to the United States, free of cost, title to such land as may be required for such constructions and approaches, and shall grant to the United States free water power or power generated from water power for building and operating such constructions, at the discretion of the Secretary of War and Chief of Engineers, may be required to maintain and operate such lock without expense to the United States. The Secretary of War may provide, as a condition of such approval, for the payment to the United States of reasonable annual charges for the benefits that accrue to the grantee by the authority given under this Act, and at the end of twenty years and every ten years thereafter the Secretary of War may readjust the annual charges as may then be just and reasonable.

"SEC. 3. That as a par of said approval the Secretary of War and the Chief of Engineers shall require that the plans, specifications, and location for any dam shall be such as shall be best adapted to a comprehensive plan for the

improvement of the waterway in question for the uses of navigation and for the full development of its water power and for other beneficial public purposes, and best adapted to conserve and utilize, in the interests of navigation and water-power development, the water resources of the region.

"SEC. 4. That as a part of the conditions and stipulations such approval shall provide—

"(a) For reimbursement to the United States of all expenses incurred by the United States with reference to the project, including the cost of any investigation necessary for the approval of the plans as heretofore provided, and for such supervision of construction as may be necessary in the interest of the United States.

"(b) For the payment to the United States of reasonable charges for the benefits which may accrue to such project through the construction, operation, and maintenance, in and about such streams, by the United States of headwater improvements of every kind, nature, and description, including storage reservoirs or forested watersheds or land owned, located, or reserved by the United States at the headwaters of any navigable stream for the development, improvement, or preservation of navigation in such stream in which such dam may be located. Such charges shall be fixed from time to time by the Secretary of War and Chief of Engineers, based upon a reasonable compensation

equitably apportioned among the grantee and others similarly situated upon the same stream receiving benefits by reason of increase of flow past their water-power structures artificially caused by such headwater improvements, the total charges to all such beneficiaries from any such headwater improvement not to exceed in any one year an amount equal to five per centum of the total investment cost, in addition to the necessary annual expense of the operation of such headwater improvement.

"(c) That in the construction, maintenance, and operation of any project under this Act for the promotion of navigation, the grantee may, with the consent of the Secretary of War, use and occupy, when necessary for carrying out the project, lands acquired by the United States through purchase or condemnation and any part of the public lands withdrawn by the President from entry or disposition for the sole purpose of promoting navigation, which the President may do, as provided in the Act entitled 'An Act to authorize the President of the United States to make withdrawal of public lands in certain cases,' approved June twenty-fifth, nineteen hundred and ten. For any of such lands so used the grantee shall pay to the United States such charges as may be fixed by the Secretary of War.

"(d) For the payment or securing the payment to the United States of such sums and in such manner as the

Secretary of War and the Chief of Engineers may deem reasonable and just substantially to restore conditions upon such stream as to navigability, existing at the time of such approval, whenever the Secretary of War and the Chief of Engineers shall determine that navigation has been injured by reason of the construction, maintenance, and operation of such dam and its accessory works.

"SEC. 5. That the right is hereby reserved to the United States to construct, maintain, and operate, in connection with any dam built in accordance with the provisions of this Act, a suitable lock or locks, booms, sluices, or any other structures for navigation purposes, and the operation of navigation facilities which shall be constructed as a part of or in connection with any dam built under the provisions of this Act, whether at the expense of such grantee or of the United States, shall at all times be subject to such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by any such dam, as shall be made by the Secretary of War and Chief of Engineers, and in the use and operation of such navigation facilities the interests of navigation shall be paramount to the uses of such dam by such grantee for power purposes. Such rules and regulations may include the maintenance and operation by such grantee, at its own expense, of such lights and other signals as may be directed

by the Secretary of War and Chief of Engineers and such fishways as shall be prescribed by the Secretary of Commerce, and for failure to comply with any such rule or regulation such grantee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than $500 for each month's default, in addition to other penalties herein prescribed or provided by law.

"SEC. 6. That the persons constructing, maintaining, or operating any dam or appurtenant or accessory works, in accordance with the provisions of this Act, shall be liable for any damage that may be inflicted thereby upon private property, either by overflow or otherwise.

"SEC. 7. That any grantee who shall fail or refuse to comply with the lawful order of the Secretary of War, made in accordance with the provisions of this Act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $1,000, and every month such grantee shall remain in default shall be deemed a new offense and subject such grantee to additional penalties therefor; and in addition to said penalties the Attorney General may, on request of the Secretary of War, institute proper proceedings in the district court of the United States in the district in which such structure or any of its accessory works may, in whole or in part, exist, for the purpose of having such violation stopped by injunction, mandamus, or

other process; and any such district court shall have jurisdiction over all such proceedings and shall have the power to make and enforce all writs, orders, and decrees necessary to compel the compliance with the requirements of this Act and the lawful orders of the Secretary of War and the performance of any condition or stipulation imposed under the provisions of this Act; and if the unlawful maintenance and operation are shown to be such as shall require a revocation of all rights and privileges held under authority of this Act, the court may decree such revocation. In case of such a decree, the court may wind up the business of such grantee conducted under the rights in question, and may declare such dam and accessory works to be an unreasonable obstruction to navigation and cause their removal at the expense of the grantee owning or controlling the same, except when the United States has been previously reimbursed for such removal, or may provide for the sale of the dam and all accessory and appurtenant works constructed under authority of this Act for the further development of water power, and may make and enforce such other and further orders and decrees as equity demands; and in case of such a sale for the further development of water power the vendee shall take the rights and privileges and shall perform the duties which belonged to the previous grantee, and shall assume such outstanding obligations and liabilities aris-

ing out of the maintenance and operation of said dam and accessory works for power purposes as the court may deem equitable in the premises.

"SEC. 8. That no rights granted under the provisions of this Act and no property or project installed and operated under the provisions or benefits of this Act shall be assigned or transferred except upon the written consent of the Secretary of War, except by trust deed or mortgage issued for the purpose of financing the business of such owner, and any successor or assign of such property or project or of any rights accruing hereunder, whether by voluntary transfer, judicial sale, or foreclosure sale or otherwise, shall be subject to all the conditions of the approval under which such rights are held, and also subject to all the provisions and conditions of this Act to the same extent as though such successor or assign were the original owner hereunder.

"SEC. 9. That the rights granted herein shall continue for a period of fifty years from and after the date of the original approval, unless sooner revoked or forfeited as provided for in this Act.

"SEC. 10. That upon not less than two years' notice prior to the expiration of any grant made hereunder, and at any time after the expiration of such grant, upon six months' notice, the United States, or any person authorized by Con-

gress, shall have the right to take over all of the property of the grantee necessary and useful for the generation, transmission, or distribution of power. Such property shall include the lands or interests in lands acquired or used for the purposes of the development and transmission of power, the dam and other structures, and the equipment necessary and useful for the generation of power, and the transmission system from generation plant to initial points of distribution, and the lock or locks or other aids to navigation, but shall not include any other property whatsoever. Before taking possession the United States or the person authorized by Congress shall pay therefor (first) the actual cost to the grantee of lands or any interests therein purchased and used by the grantee in the generation and distribution of power, and (second) the fair value of the other properties taken over, together with the cost to the grantee of the lock or locks or other aids to navigation and all other capital expenditures required by the United States in assuming all contracts for electrical energy extending beyond the granting period which have had or may have the approval of the Secretary of War, and which were entered into in good faith and at a reasonable rate. The actual cost of lands or interests therein and the fair value of other property shall be determined by agreement between the Secretary of War and the owners of such property, and in the event of their failure to agree then by

proceedings instituted by the United States, or by the person authorized by the United States, in the district court of the United States within which any portion of such dam may be located.

"In determining the fair value of the property other than lands or interests in lands allowance shall be made for deterioration, if any, of the existing structures and transmission lines, and no value shall be claimed or allowed for the rights hereby granted, for good will, going concern, profit in pending contracts for electrical energy or for other conditions of current or prospective business or for any other intangible element.

"SEC. 11. That in all cases where the electric current generated from or by any of the projects provided for in this Act, including leases under section fourteen hereof, shall enter into interstate or foreign commerce, the rates, charges, and service for the same to the consumers thereof shall be just and reasonable, and every unjust and unreasonable and unduly discriminatory charge, rate, or service therefor is hereby prohibited and declared to be illegal; and whenever the Secretary of War shall be of the opinion that the rates or charges demanded or collected on the service rendered for such electric current are unjust, unreasonable, or unduly discriminatory, upon complaint made therefor and full hearing thereon, the Secretary of War is hereby authorized and em-

powered to determine and prescribe what shall be the just and reasonable rates and charges therefor to be observed as the maximum to be charged and the service to be rendered; and in case of the violation of any such order of the Secretary of War the provisions of this Act relative to forfeiture and failure to comply shall apply. That in the valuation for rate-making purposes of the property existing under said approval of the project there may be considered any lock or locks, or other aids to navigation, and all other capital expenditures required by the United States, but no value shall be claimed or allowed for the rights hereby granted for good will, going concern, or any other intangible value.

"The Secretary of War is further authorized and directed to include among the conditions for his approval of any plans or any project herein provided, including leases under section fourteen hereof, as an express condition thereof, a clause reserving to the Secretary of War the same rights, powers, and duties set forth in this section, together with the same penalty for violation thereof: *Provided,* That whenever the State in which such current shall be used shall have provided by law adequate regulation for rates, charges, and service to the consumers for such electric current and such regulation shall not be unduly discriminatory or unjust against the service or charges in any other State arising from the use of the power from the same

project, and such facts shall be established to the satisfaction of the Secretary of War, then in such case the provisions of this section shall not apply to the rates, charges, and service in and for such State.

"That, except upon the written consent of the Secretary of War, no sale or delivery of power shall be made to a distributing company, except in case of an emergency.

"The Secretary of War shall have the right to provide rules and regulations for uniform accounting, to examine all books and accounts of grantees under the terms of this Act, to require them to submit statements, representations or reports, annual or special, including full information as to assets and liabilities, capitalization, cost of project, cost of operation, the production, use, transmission and sale of power. All such statements, representations and reports shall be upon oath unless otherwise specified, and in such form and on such blanks as the Secretary of War may require, and any person making any false entry, statement, representation or report under oath shall be subject to punishment as for perjury.

"SEC. 12. That the grantee shall commence the construction of the dam and accessory works within one year from the date of the approval herein provided, and shall thereafter, in good faith and with due diligence, prosecute such construction, and shall, within the further term of three

years, complete the dam and afterwards shall, within such times as the Secretary of War and the Chief of Engineers shall prescribe, put in commercial operation such part of the ultimate development as the Secretary of War and the Chief of Engineers shall deem necessary to supply the reasonable needs of the then available market, and shall, from time to time thereafter, construct such portion of the balance of such ultimate development as said Secretary of War and Chief of Engineers may direct and within the time specified by said Secretary of War and Chief of Engineers so as to supply adequately the reasonable market demands until such ultimate development shall be completed; and extensions of the periods herein specified, not to exceed two years, may be granted by the Secretary of War, on recommendation of the Chief of Engineers, when, in his judgment, the public interest will be promoted thereby. In case the grantee shall not commence actual construction within the time herein prescribed, or as extended by the Secretary of War, then the authority as to such grantee shall terminate, and in case any dam and accessory works be not completed within the time herein specified or extended as herein provided, then the Attorney General, upon the request of the Secretary of War, shall institute proper proceedings in the proper district court of the United States for the revocation of said authority, the sale of the works constructed, and such other equitable relief

as the case may demand, as provided for in section seven of this Act.

"SEC. 13. That the right to alter, amend, or repeal this Act is hereby expressly reserved as to any and all dams which may be authorized in accordance with the provisions of this Act. In such case the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in such dam.

"SEC. 14. That the Secretary of War be, and he is hereby, authorized to enter into leases for the use of surplus water and water power generated at dams and works constructed wholly or in part by the United States in the interests of navigation at such rates, on such terms and conditions, and for such periods of time not to exceed fifty years, and with such provision for the periodical readjustment of rentals as may seem to him just, equitable, and expedient, subject, however, to the provisions of this Act governing the authorization, maintenance, and operation of power plants and to all regulations governing the use and disposition of the power, so far as the same may be applicable; and all such leases, the parties thereto, and the terms and conditions thereof, shall be reported annually to Congress: *Provided*, That said Secretary of War, in making such leases,

shall give preference to any municipal corporation or other public corporation not operated for private profit.

"SEC. 15. That no rights or privileges granted under this Act and no works constructed, maintained, and operated under the provisions of this Act shall be owned, trusteed, or controlled by any device or in any manner so that they may form a part of, or in any manner effect, a combination in the form of an unlawful trust or form the subject of an unlawful contract or conspiracy to limit the output of electric energy or in restraint of the generation, sale, or distribution of electric energy, or the exercise of any other business contemplated: *Provided, however,* That it shall be lawful under the approval of the Secretary of War for different grantees to exchange and interchange currents, to assist one another whenever necessary, by supplementing the currents or power, and enable any grantee to secure assistance to carry on the business and supply his customers, accounting therefor and paying therefor under regulations to be prescribed by the Secretary of War.

"In no case shall such an arrangement be permitted to raise the price, render unjust or unfair any practice, work, or discrimination, or operate in restraint of trade.

"If any grantee shall violate the provisions of this section it shall forfeit all rights and privileges conferred by this Act.

"SEC. 16. That the word 'persons' as used in this Act shall be construed to import both the singular and the plural, as the case demands, and shall include corporations, companies, and associations. The word 'dam' as used in this Act shall be construed to import both the singular and plural, as the case demands.

"SEC. 17. That all of the provisions in sections two, three, four, five, nine, ten, eleven, and fifteen of this Act fixing conditions of the consent of Congress and regulating practices and charges between the grantees and their customers for the construction, maintenance, and operation of dams in the navigable waters of the United States shall apply alike to all existing enterprises in operation or previously authorized in the navigable waters of the United States in which the approval and supervision of the Secretary of War and Chief of Engineers are required, as well as to new projects in the navigable waters of the United States for which the consent of Congress may hereafter be granted, in the construction, maintenance, and operation of which the approval and supervision of the Secretary of War and Chief of Engineers shall be required. All conflicting provisions contained in any previous Act of Congress granting consent for the construction, maintenance, and operation of any dam in the navigable waters of the United States in the

construction, maintenance, and operation of which the approval and supervision of the Secretary of War and the Chief of Engineers were required are hereby repealed, and all such previous authorizations are so altered, amended, and modified hereby as to conform to all the conditions and provisions in said sections two, three, four, five, nine, ten, eleven, and fifteen of this Act.

"SEC. 18. That the provisions of this Act shall not apply to irrigation or power dams or grants to municipal corporations affecting the use of water or water power for municipal purposes, or other projects under the jurisdiction of the Secretary of the Interior or the Secretary of Agriculture upon the public lands of the United States."

Passed the House of Representatives August 4, 1914.

Attest: SOUTH TRIMBLE,

Clerk.

By D. K. HEMPSTEAD,

Enrolling Clerk.

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